APPENDIX

Page

Arbitration Decision .....Resp. App. 1

(This document was submitted in support of Defendant's motion for summary judgment in the lower court and appears at R. 199-164)

OSSO Newsletter June 1993.....Resp. App. 39

(This document was submitted in support of Defendant's motion for summary judgment in the lower court and appears at R. 217)

IN THE MATTER OF A STEP II GRIEVANCE APPEAL HEARING BETWEEN HOUSTON POLICE OFFICERS ASSOCIATION HOUSTON, TX AND HOUSTON POLICE DEPARTMENT CITY OF HOUSTON HOUSTON, TX	REFERENCE: A 70 390 0002 94 SERGEANT J. A. VOLLERT, STEP II GRIEVANCE EMPLOYEE #84146

Hearing was held at the Houston, Texas office of the American Arbitration Association, 1001 Fannin, Suite 1005, on July 8, 1994, commencing at 9:00 a.m. and ending between 5:30 and 6:00 p.m. The parties gave their permission for the Hearing to be tape recorded, used for educational purposes and submitted for possible publication. The witnesses were sequestered and sworn just prior to testifying. Prior to the close of the Hearing both attorneys and the Appellant were asked if they had anything further to say. All answered in the negative. The Appellant was asked if he felt that he had received a full and fair Hearing and if the Union had adequately represented him. He answered in the affirmative to both questions. The Hearing was considered closed upon receipt of the post-Hearing appeal briefs by the Independent Third Party Hearing Examiner (hereinafter referred to as the Hearing Examiner or H.E.), with the Award due from the Hearing Examiner to the American Arbitration Association on or before 5 October 1994.

HEARING EXAMINER: Dr. Milden J. Fox, Jr., P.E., CMfgE, selected under the procedures of the American Arbitration Association.

REPRESENTING THE PARTIES

Appellant: Fred A. Keys, Jr., Attorney
HPOA, 1602 State Street
Houston, TX 77007 (713/237-0282)

Carl C. Casteel, Attorney
Watts & Associates
Houston, TX 77006 (713/961-7757)

City: Lonica Poindexter, Assistant City Attorney
P. O. Box 1562
Houston, TX 77251 (713/247-1509)

PRESENT FOR THE PARTIES

Appellant: Officer J. J. Berry, Jr., Accident Div., 1st V.P. HPOA

Cpt. C. V. Tompkins, Captain Jail Division

Officer G. L. Blankenship, Motorcycle Div., Dir #6 HPOA

Officer Mark Clark, Police Officer, Former Pres. of HPOA

Officer J. A. Vollert, Grievant, Patrol Officer at Central Patrol (now a Sgt.)

City: Officer May Walker, President AAPOL, Police Officer Community Services Division

Officer Matias Perales, Police Officer Personnel Div., Former Assistant Director HPOA

Officer Ignacio Aranda, Police Officer, Internal Affairs Division, President OSSO

Assist. Chief Simmons, in charge of Technical Service Command, including the Jail

Lt. E. G. Huhn, Internal Affairs

Captain Jones, ADC

STIPULATIONS

The parties stipulated the following:

1. The grievance is properly before the Independent Third Party Hearing Officer.
2. The Grievant (Appellant) prepared JE-3 (the letter in question).
3. The Grievant (Appellant) distributed JE-3 only to members of the HPOA Board of Directors.
4. JE-3 was brought to the attention of the Chief of Police by the President of the Organization of Spanish Speaking Officers (JE-9).
5. The Grievant (Appellant) held Position 12 on the HPOA Board of Directors at the time JE-3 (the letter) was written.
6. The President of the Organization of Spanish Speaking Officers was not a member of the HPOA Board of Directors at the time JE-3 (the letter) was written and distributed.
7. Officer Perales was a member of the HPOA Board of Directors, and a member of OSSO, at the time JE-3 (the letter) was written and distributed.
8. At the time JE-3 (the letter) was written and distributed, there were three minority voting members of the HPOA Board of Directors, out of a total of 15 voting members.

9. Sgt. Brown, IAD Investigator, permitted the Grievant (Appellant) to read CE-2 & 5 plus he gave the Grievant (Appellant) a copy of JE-9 and asked him to respond to these letters. The Grievant (Appellant) responded to Sgt. Brown's request with JE-6.

STATEMENT OF THE ISSUE

The parties could not agree on a Statement of the Issue, so the Hearing Examiner has set forth the following:

> Did the Houston Chief of Police violate any law, rule or regulation when he issued a letter of written reprimand to the Appellant? If so what, if any, should be the remedy?

GRIEVANCE

The grievance is based on the following letter, written by the Appellant on official HPOA stationery dated May 17, 1993 (JE-1, Exhibit 3).

> I will be getting promoted (despite my race) on May 4, 1993 at 1:30 p.m. at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast corner of Memorial and S. Shephard. You are cordially invited to attend and give proper and justice (sic) respects to those who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

On October 8, 1993 the Chief of Police wrote the Appellant the following *Written Reprimand* (JE-1, Exh. 1).

> It is specified that, on or about May 17, 1993, you failed to comply with Houston Police Department rules and regulations regarding CONDUCT AND BEHAVIOR, RESPECT FOR FELLOW OFFICERS, AND USE OF RACIAL JOKES AND SLURS.
>
> Investigation revealed that on the above date, while off duty, you prepared a letter to announce your upcoming promotion to sergeant on May 24, 1993. Although the corresondence [sic] was distributed to a limited number of co-workers, you used poor judgement by including remarks and/or terms in the letter which were demeaning to fellow officers, embarrassing to the Department, and of a nature that could be considered a racial slur or to be racially motivated.
>
> It has been determined that, by your actions, you have violated the following:
>
> HOUSTON POLICE DEPARTMENT RULES MANUAL
>
> Section(s) 2.3 – Conduct and Behavior
> 3.1 – Respect for Fellow Officers
> 4.21 – Use of Racial Jokes and Slurs
>
> Consequently, you should consider this memorandum a reprimand regarding your misconduct, and notice that repetition of such actions will not be tolerated.

The Step II grievance, dated 10-19-93, states the following (JE-1, Exh. 2):

NATURE OF GRIEVANCE:

Matt Perales and Ignacio Aranda claim to be offended by an invitation to my promotion on May 24, 1993. The invitation was distributed to Houston Police Officers Association board members only. Aranda published the content of the invitation to members of the Organization of Spanish Speaking Officers.

Chief Nuchia initiated a complaint and sustained charges of Conduct and Behavior, Respect for Fellow Officers and Use of Racial Jokes and Slurs, resulting in a written reprimand.

The promotion invitation was a private memorandum to fellow H.P.O.A. board members regarding a matter of considerable public concern, the City's settlement of the Edwards lawsuit and subsequent remedial promotions. My satirical comments concerned merit, not race. This discipline violates my First Amendment right to speak out in opposition to the City and/or the Houston Police Department about a matter of public concern.

PROPOSED SOLUTION REQUESTED:

Exoneration of all charges and removal of any reference regarding these allegations from my personnel file for all purposes.

LAWS, RULES, REGULATIONS

HOUSTON POLICE DEPARTMENT RULES MANUAL

The below Sections of the above (JE-1, Exh. 12) are the Sections which the Appellant is charged with violating.

* * *

SECTION TWO: ATTENTION TO DUTY

* * *

2.3 Conduct and Behavior

Officers whether on-duty or off-duty shall follow the ordinary and reasonable rules of good conduct and behavior and shall not commit any act in an official or private capacity tending to bring reproach, discredit, or embarrassment to their profession or the department. Officers shall follow established procedures in carrying out their duties as police officers and employees of the department, and shall at all times use sound judgment.

* * *

SECTION THREE: COOPERATION WITH FELLOW OFFICERS AND AGENCIES

3.1 Respect for Fellow Employees

Officers shall treat other members of the department with respect. They shall be courteous, civil and respectful of their superior officers and associates and shall not use threatening or insulting language.

* * *

SECTION FOUR: RESTRICTIONS ON BEHAVIOR

* * *

4.21 Use of Racial Jokes and Slurs

No officer shall engage in any form of speech likely to be construed as a racial or religious slur or joke, whether in the presence of citizens or of other officers.

TEXAS LOCAL GOVERNMENT CODE

* * *

§143.129 Step II Procedure

* * *

(d) If the proposed solution is not acceptable, the firefighter or police officer may either submit a written request stating the person's decision to appeal to an independent third party hearing examiner pursuant to the provisions of Section 143.057 or . . . Notwithstanding Section 143.057(i), if the firefighter or police officer prevails and the hearing officer upholds the grievance in its entirety, the department shall bear the cost of the appeal to the hearing examiner. If the firefighter or police officer fails to prevail and the hearing examiner denies the grievance in its entirety, the firefighter or police officer shall bear the cost of the appeal to the hearing examiner. If neither party entirely prevails and the hearing examiner upholds part of the grievance and denies part of it, the hearing examiner's fee and expenses shall be shared equally

by the firefighter or police officer and the department.

BACKGROUND

The instant Hearing is between the Houston Police Officers Association (hereinafter referred to as the Association or HPOA) and the City of Houston (hereinafter referred to as the City or Management). The grievance that is being heard involves a Step II grievance filed by Sergeant J. A. Vollert (being represented by HPOA) involving his discipline by way of a Written Reprimand for a letter (invitation to his promotion) he wrote and distributed to members of the HPOA Board of Directors on 17 May 1993. The letter was written on HPOA official stationery (JE-3). The Written Reprimand for the contents of the letter resulted from the reactions and complaints made to the Houston Police Department (HPD) on 6-24-93 (JE-1, Exh. 7) and to the Chief of Police on June 7, 1993 (JE-1, Exh. 9). Who made the complaint of 6-24-93 is unknown, as no name other than the Appellant appears on JE-1, Exh. 7. However, the President of the Houston Police Organization of Spanish Speaking Officers (OSSO) wrote the letter of June 7, 1993 (JE-1, Exh. 9).

As a background to the instant matter, the following are the known events that led to the instant matter.

In 1976 and 1975 respectively two lawsuits were filed in the U.S. District Court for the Southern District of Texas, Houston Division. These were *Comeaux v. City of Houston,* Civil Action No. 76-H-1754, and *Kelley v. Hoffheinz,* Civil Action No. H-75-1536. These lawsuits challenged a variety of allegedly discriminatory practices,

and the *Comeaux* action specifically challenged discrimination in promotional tests. By Order entered on June 18, 1992 in *Comeaux* and *Kelley*, all claims of discrimination not involving promotional examinations were dismissed, and the claims of discrimination involving promotional examinations were limited to promotions for the ranks of Sergeant and of Lieutenant from January 1, 1982 on.

In July 1992, a small group of black and hispanic Houston Police Officers also filed suit in the U.S. District Court for the Southern District of Texas, Houston Division. The basis of the suit was a challenge to the HPD's civil service promotional system. The suit alleged discrimination based upon disparate impact. No intentional discrimination was alleged. The suit was consolidated with the two suits cited above that had been languishing in the courts for almost 17 years.

The City answered the suit and, according to HPOA, appeared prepared to defend the HPD as they had in the previous lawsuits. However, during the latter part of August or early September 1992, the City began settlement negotiations and the draft of what was to become known as the "Edwards Consent Decree." The major police employee groups were neither consulted or informed of the pending settlement which drastically altered the provisions of the promotional system mandated by state civil service pursuant to Tex. Loc. Gov't. Code Chapter 143. According to HPOA, in December 1992, the first notice of the pending consent decree was made public. The outcry of the non-protected members of the HPD was immediate, loud and appeared to be unified. The theme of the cry was generally: "What could be

more fair than the current system?" and, "What can you (employee groups) do to stop this?"

Both major employee groups moved to intervene but were rejected by Judge Lynn Hughes. The denial was allegedly based upon the timeliness of the intervention – the bootstrapped languishing cases made the suit 17 years old. According to HPOA, the original plaintiffs were also denied intervention because they sat on their rights. The Edwards Consent Decree became the law of the HPD promotion system in March 1993, and the Appellant's eligibility list was the first affected by its edicts. The denial of intervention was appealed, according to HPOA, by four prospective intervenor groups, including the two major employee groups, to the U.S. Court of Appeals for the Fifth Circuit. Oral argument was heard on May 31, 1994. The decision of the Fifth Circuit is pending.

This background and the political climate of the time is relevant to the instant Hearing. The Appellant held the rank of police officer during the period prior to May 1993 and, according to his uncontroverted testimony, was diligently studying for the Sergeant Promotional Examination. He was also an elected Director (Position 12) of the HPOA. Thus, according to HPOA, the Appellant was affected by the consent decree both personally and politically.

The proposed settlement of the *Edwards* lawsuit was the topic of local media coverage, as shown by several newspaper articles consisting of JE-1, Exh. 11. The topic was of extreme concern to the rank and file police officers and was discussed daily "on the street" and monthly in

the Associations' Board Meetings. The Director Appellant and a unanimous Association Board of Directors present voted not only to attempt intervention in the suit on behalf of their non-protected members, but also to appeal the denial of intervention.

According to HPOA, the issue in opposition to *Edwards* has never been about race. The Association allegedly proposed and gained passage of the original state Civil Service law in 1947, formerly Tex. Rev. Ann. Stat. 1269m. Since that time, according to the Association, it has been unremitting in the fight for officers' rights and has staunchly defended the integrity of the civil service laws.

According to HPOA, the *Edwards* settlement gutted the promotion system. Again according to HPOA, no challenge was made by the City to the plaintiff's statistical analysis "proving" disparate impact and no attempt was made to show that the promotional tests were job related or a fair predictor of future job performance.

The remedial relief granted was the promotion of 96 sergeants and 10 lieutenants from the plaintiff class over a five year period. The prospective relief granted was the application of a log linear analysis to promotional test answers to discard those questions indicating a 20% variation in the performance of all candidates and to extend the life of the promotion eligibility lists from one to two years.

The *Edwards* settlement " . . . would promote 62 Blacks and 34 Hispanics to Sergeant and seven Blacks and three Hispanics to Lieutenant," JE-1, Exh. 11. These promotions were to take place as follows:

Year	Sergeant	Lieutenant
1993	22	3
1994	21	2
1995	19	2
1996	18	2
1997	16	1
Total	96	10

According to uncontroverted testimony by the City's witness(es), these 106 promotions were in addition to the normal number of civil service promotions available to officers through the regular civil service examination procedures. In addition, the City also said that all 106 individuals promoted under the *Edwards* agreement had taken and passed the regular civil service examination with the required score of 70 or better.

The above background information merely shows the extreme interest and opinions that many individuals in HPOA had regarding the *Edwards* settlement.

Three groups of promotions to Sergeant were made in 1993. These were on May 13, 21, and 24. Each group contained originally the names of 16 officers each (GE-1). What is interesting about this list, which was put out by HPD and was available at each promotion session, as near as could be determined, was that the basis for the promotion of each officer was indicated plus the officer's race if that officer was promoted under the *Edwards* lawsuit. The Appellant was listed in the third group as number 11 being promoted as #21 off the current civil service examination list. It is not known for certain how

the promotion list was constructed as far as the lawsuit officers are concerned, but the civil service promotions were by rank and these were interspersed among the lawsuit promoted officers. For example, in group number one promoted May 13, 1993 the 16 positions were as follows:

	Seniority Date	Lawsuit
1	03-23-83 #5 (B) Plaintiff	Edwards Lawsuit
2	11-26-85 Plaintiff	Lee Lawsuit
3	02-27-93 #1 of Current List	
4	10-27-89 #20 (H) Plaintiff	Edwards Lawsuit
5	11-26-85 Plaintiff	Lee Lawsuit
6	04-10-93 #2 of Current List	
7	01-17-87 #17 (B) Plaintiff	Edwards Lawsuit
8	04-24-93 #3 of Current List	
9	07-31-85 #16 (H) Plaintiff	Edwards Lawsuit
10	04-24-93 #4 of Current List	
11	04-29-88 #18 (B) Plaintiff	Edwards Lawsuit
12	04-29-93 #5 of Current List	

13	05-17-84 #8 (H) (sic)	Edwards Lawsuit.
14	04-24-93 #6 of Current List	
15	05-08-93 #7 of Current List	
16	04-29-88 #19 (B) Plaintiff	Edwards Lawsuit

The Appellant testified that he had not seen GE-1 at the time he wrote his 17 May 1993 letter.

On 17 May 1993, the Appellant wrote his letter which is the core of the instant Hearing. It was written on official HPOA stationery and placed in the mailboxes of each HPOA Director. The exact nature of these mailboxes was never established but it was indicated that they were not open boxes that could be seen by any passing individual. The letter was not distributed to any other individuals and, according to the Appellant, he retained the one or two extra copies he had made of the letter.

Officer M. S. Perales, Director #8, says in CE-2 that he was offended by the letter and discussed its content with the President of HPOA. Officer Perales was not satisfied with the action of the HPOA's President so he contacted the President of OSSO, Officer Ignacio Aranda. Director Perales admitted that he never contacted his fellow Director (Appellant) in any manner regarding his feeling about the letter.

On May 26, 1993 the President of OSSO write [sic] the President of HPOA regarding the letter in question in which he states in part (CE-3):

* * *

> OSSO respectfully requests that you, Mr. President, demand Director Vollert's immediate resignation. Further, that you "OFFICIALLY" apologize, via the "Badge and Gun", to the HPOA minority members that were insulted by what appears to be a blanket indictment of all minority promotees by Director Voller's [sic] calloused and irresponsible remarks.

* * *

The HPOA President's reply dated May 27, 1993 (CE-4) merely stated that he, the President, had discussed the letter with the Appellant and that the contents of the letter were not authorized by HPOA, the contents of the letter were the words of the author, and that HPOA did not support or promote racial or sexual bias of any kind.

On June 7, 1993 the President of OSSO, for whatever reason, wrote the Chief of Police (JE-1, Exh. 9) about the Appellant's letter, thus taking the matter outside of the police officers' associations or organization. This letter said in part the following:

* * *

> OSSO respectfully requests that you, as Chief of Police, determine whether this type of behavior is a violation of the rules and regulations of this department. Specifically, section 4.21 Use of Racial Jokes and Slurs of the Houston Police Department Rules Manual.

* * *

Once the above letter was written to the Chief of Police, an IAD investigation was required by the HPD

regulations. This was known by the OSSO President, as he is an IAD officer.

In the June 1993 Newsletter of OSSO NEWS, the lead article on page 1 was the PRESIDENT'S LETTER (JE-1, Exh. 10) regarding the Appellant's letter in question. When this June newsletter was put out is not known. From the other information contained in the newsletter, it would appear that it was put out sometime in June 1993.

Sergeant Brown, IAD Investigator, took statements from Officer Aranda (CE-5), Officer Perales (CE-2) and Appellant (JE-6) following his notification of the complaint to IAD against the Appellant (JE-1, Exh. 7). The parties stipulated that Sgt. Brown showed copies of CE-2 & 5 and gave Appellant JE-9. The results of the IAD investigation went forward through the administrative levels of HPD and were sent back once to IAD for further investigation when there was the possibility of the Appellant's constitutional rights under the First Amendment being violated. Somewhere along the line in the administrative procedure, the recommendation was made that the Appellant should receive divisional counseling for all three alleged violations. However, when the proper supervisor conferred with the Chief of Police about the matter, that supervisor was told by the Chief that he, the Chief, would not accept anything less than a written reprimand. The required supervisors then signed off in support of the Written Reprimand, including the ADC, and said written reprimand was issued on October 8, 1993 by the Chief of Police (JE-1).

The Appellant timely filed a grievance over his written reprimand and the Step II Grievance Hearing denial

dated November 22, 1993 (JE-1, Exh. 5) was issued by the Chief of Police. The Appellant, on December 3, 1993, then notified the Director, Civil Service Commission, of his election to appeal to an independent third party hearing examiner instead of a grievance examiner (JE-1, Exh. 8).

The parties, being unable to settle this matter, have brought it before this Hearing Examiner for a decision.

POSITION OF THE PARTIES

City:

It is the City's position that as a paramilitary organization, the HPD places a very high premium on the character and veracity of its police officers. The underlying rationale for such stringent requirements is, perhaps, rooted in the fact that the public places an enormous amount of trust, responsibility and power in its law enforcement agencies to protect and guard their lives and property. Police officers have the power to effect the arrest of a citizen, seize his personal property and possessions and, even under the most guarded circumstances, to take away the life of another. That power is awesome!

Consequently, the demands for adherence to departmental rules are even more exacting on this profession. Imagine the endless perils faced by a law enforcement agency if that department's operations were constantly undermined by issues of officers' inability to follow the department's internal rules while attempting to enforce the laws of the State of Texas. Thus, the HPD does not treat allegations of failing to adhere to departmental rules lightly.

Moreover, inappropriate conduct and behavior, disrespect for fellow officers, and use of racial jokes and slurs will not be tolerated within the HPD. Statements made which are derogatory and offensive, whether meant as a "tongue in cheek" comment or not, serve only to disrupt the efficient operations of the department and lend no positive result from which either the public or the department could benefit. Therefore, such rules violations must be met with progressive discipline in order to deter any future inappropriate conduct on the part of the Appellant and/or any other member of the HPD with the propensity to commit a same or similar infraction.

Credibility is an issue in the instant case involving the reason and meaning of the Appellant's letter. The Hearing Examiner has several guidelines previously used by arbitrators. Simply put, a credibility issue often turns on who has the most to lose or gain. In the instant case, it is the Appellant who has the most to lose.

In HPOA's opening statement, a contention was made that the written reprimand violated the Appellant's right to free speech. It was contended that the statements were relating to a matter of "public concern," thus, automatically protected by the First Amendment. However, the "public concern" exception, as stated in *Connick v. Myers*, 461 U.S. 138, (1983), is not the beginning and end of the legal analysis of whether an employee's speech could be curtailed by a governmental employer without violating the employee's First Amendment right to free speech. The United States Supreme Court emphatically stated:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Id. at 146.

The HPOA asserts that by imposing disciplinary action against the Appellant for statements made by him to the HPOA Board of Directors, the HPD has violated the Appellant's First Amendment right to free speech. However, the Appellant's contention is ill advised. In *Attaway v. City of Mesquite*, 563 S.W. 2d 343 (Tex. App. – Dallas 1978), the Texas Court of Civil Appeals upheld the lower courts' finding that there was no infringement of constitutional right of free speech when the communication (a cartoon in that case) was not intended to be a serious contribution to public discussion on a matter of general interest. Like Appellant's communications to the members of the HPOA Board of Directors, the Appellant did not intend for his statements to be a serious contribution to public discussion on a matter of public concern.

The Appellant's own witness, 1st Vice President of HPOA, testified and characterized JE-3 as "tongue in cheek," "quirky," "satirical," "funny," "no social redeeming value." He further testified that he did not believe that the writing was a serious contribution to public discussion. He also testified that the HPOA debates regarding the settlement of the *Edwards* lawsuit were no longer going on at the time the Appellant wrote and

distributed JE-3. The lawsuit had been settled, the consent decree was entered, and the benefactors were being promoted.

The Chief's decision to reprimand the Appellant for the writing and dissemination of JE-3 was based on considerations of the Appellant's deliberate violations of Departmental Rules and the effect such communications could have on the Appellant's fellow officers and the HPD as a whole. Testimony, from the President of the OSSO, HPOA Director 6 who is also a member of OSSO and the President of AAPOL confirmed that the members of their respective organizations were offended and irate over the communications of the Appellant. If this type of communication was allowed to be continued unabated and/or condoned by the HPD, the result could very well be war between the "good guys and good guys," instead of between the "good guys and the bad guys," the criminals. It is in the best interest of the public, the HPD and the officers of the HPD to put an end to this type of conduct and behavior, disrespect for fellow officers, and use of racial jokes and slurs.

It is further the City's position that libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation. See the definition stated in the Texas Civil Practice & Remedies Code, §73.001 (1991). Furthermore, slander *per se* is that which affects a person in his or her business, trade, profession, office, or calling. See *Ramos v. Henry C. Beck Co.*, 711 S.W. 2d 331 (Tex.App. –

Dallas 1986, no writ). The statements made by the Appellant in JE-3 could very well be considered defamatory and thus exempt from First Amendment protected speech, not to mention actionable in a court of law by a class of identifiable individuals.

It is the City's position that it has proven its justification for the written reprimand of the Appellant and the grievance should be denied in its entirety.

HPOA:

It is the position of HPOA that the comments contained in the "invitation" clearly refer to the aftermath of the *Edwards* lawsuit. It has been clearly proven by the great weight of the evidence, including the testimony of the City's witnesses, that this was a matter of intense public concern.

Public employees do not lose their First Amendment right to free speech by virtue of their employment. However, even speech that relates to a matter of public concern must be balanced with the ability of the employer to provide effective service to the public. In the instant case, the City has not produced any evidence to show that the HPD operations were in any way affected by the "invitation" to the Appellant's promotion ceremony.

The evidence in this case shows that the Appellant is a valuable employee who interacts well on the job with Officer Perales (GE-6). No causal link was shown by any

witness between the "invitation" and the effective operation of the HPD. The Appellant has every right to disagree with the policies of the HPD and to speak out in opposition to those policies.

The discipline in this case is a blatant attempt to chill the free speech rights not only of the appellant, but for all police officers. HPOA may disagree with what some officers say, but HPOA must defend their right to say it. The Association stands equally ready to defend Officers Perales and Aranda against HPD discipline in similar circumstances.

Every witness in the instant case agreed that this was the first time to their knowledge that HPD discipline had intruded the sanctity of an employee group board room. Association Board meetings are generally open to all members. Will the HPOA Baord [sic] be forced to hold routine business in executive session for fear of offending someone in attendance? Free and open debate is the foundation of our democracy. Government intrusion upon this freedom, even in the work place, must be strictly restricted to clear interference with the actual ability of the public employer to perform the tasks commissioned by the public they serve.

The City admits error by allegedly violating the civil rights of its minority employees, then compounds the error by violating the free speech right of the Appellant who echoes the very sentiments expressed by various courts of this land who have dealt with identical problems in enforcing voluntary affirmative action programs.

Some may wonder why the appellant would appeal a Written Reprimand. The answer is simple. The chief of

Police's Written Reprimand is a permanent part of the Appellant's personnel file. This file will follow him throughout the remainder of his career with the HPD and beyond. The Appellant should not be branded a racist because he opposed the Edwards consent decree. The Written Reprimand attacks the Appellant's integrity and honor, which is the core value of every law enforcement officer. This cannot go unchallenged. This Written Reprimand has far reaching future consequences for someone with aspirations to advance his career in law enforcement. Severity is judged from th perspective of the person receiving the punishment and should be judged on a case by case basis.

The power of a Hearing Examiner to overturn the discipline recommended by the Chief of Police is well defined and broad in nature. The source of this power is found in Tex. Loc. Gov't. Code §143.118, which provides that the Fire Fighter's and Police Officer's Civil Service Commission may reduce or reverse disciplinary suspensions imposed by a department head. This power is granted without any qualifying language referring to "para-military" organizations, or deferral to the decision making authority of the department head. In fact, the language surrounding this grant of power instead empowers the Commission to "instruct the department head" of the action it requires of him, and refers to portions of Tex. Loc. Gov't. Code §143.120 regarding procedures the Commission may use to compel him to do so, including contempt. This same section also provides for mandatory dismissal of department heads who intentionally refuse to comply with such a Commission order for ten or more days. Tex. Loc. Gov't. Code §143.120(f)(g).

The same powers described as being held by the Commission are also held by a Hearing Examiner, should one be designated by the employee pursuant to Tex. Loc. Gov't. Code §143.1016. The powers are specifically granted by Tex. Loc. Gov't. Code §143.129 (d), 143.057(f), which vests a Hearing Examiner with "the same duties and powers as the commission . . . "

A Hearing Examiner is not required to accept the judgment of the Chief of Police without question. In the context of this case, it is clear that any discipline is severe if the underlying facts are not true or if the relevant conduct is protected as a fundamental freedom. A Hearing Examiner may freely and impartially reevaluate the wisdom of the Police Chief to impose any punishment.

In conclusion, the Appellant is not a racist. It is a stretch to pull a racial slur out of the "invitation" on its face, but within context it is plain that the reference is to recipients of the endowment of the *Edwards* settlement. The Appellant's letter vented frustration at the system of intentional reverse discrimination decreed by the settlement of the *Edwards* lawsuit. Both he and the HPOA dispute the validity of the proof of disparate impact accepted by the City. The litigation continues in the U.S. Fifth Circuit Court of Appeals and, if necessary, beyond. The only question here is whether the HPD will be allowed to use formal discipline to sanction anyone who dares speak out in opposition to its policies when such speech in no way affects the effective operation of the Police Department.

The Appellant, based upon the above and foregoing, respectfully requests that this grievance be sustained,

that the Written Reprimand be overturned and that the Written Reprimand be expunged from his personnel file.

DISCUSSION

In the area of discipline, it is incumbent upon the City to prove guilt of wrongdoing as specified in TLGC §143.1015(J) which says:

> In any hearing relating to the appeal or review of an action of the department head that affects a fire fighter or police officer the department head shall have the burden of proof. The department head is required to prove the allegations contained in the written statement, and the department head is restricted to the written statement and charges, which may not be amended.

The Statement of the Issue asks whether or not the Chief violated any law, rule or regulation when he disciplined the Appellant with a Written Reprimand. To prove its case as specified above, the standard has been set forth in what was formerly VACS 1269(m), namely:

1. Are the charges made by the Chief true as made?

2. Are these charges legally sufficient?

3. Is the punishment appropriate for the offense?

In the area of burden of proof or burden of the affirmative, the City has the initial burden to justify its action. Once this burden has been shouldered, the burden of the affirmative passes to the Appellant who must, if he

is to prevail, either successfully refute the City's establishing of "just cause" or else prove mitigating circumstances.

The burden of the City can be satisfied through the establishment of a "prima facie" case. This condition has generally been defined as a presentation of evidence, sufficient in quality and quantity to warrant a ruling by a Hearing Examiner in favor of the presenting party "if no contrary evidence" is proffered by the opposing party (I. B. Jones, *Evidence,* ¶205, 5th Ed., 1958 Supp. 1971 as cited in Owen Fairweather, *Practice and Procedure in Labor Arbitration,* BNA, Inc., p. 201).

If the Appellant admits that s/he has performed the act for which s/he was disciplined, the affirmative of the issue generally moves to the Appellant. S/he must prove that there was good reason or excuse for his/her acting as s/he did. Should the Appellant successfully establish his/her reason or excuse for having committed the act(s), the burden shifts back to the City.

As pointed out by the parties, the instant case involves matters of credibility. In order to establish proof it is possible for a Hearing Examiner not to make an uneasy, highly uncertain credibility choice between opposing witnesses merely by using a legal device for determining the facts from conflicting evidence in the record. This device is the introduction of a presumption which places the burden of proof on one of the parties to produce sufficient evidence to avoid a ruling against that party on the issue. The party having the burden of proof is said to have the "affirmative of the issue," meaning that it is the party that would be defeated if the bare

question to be answered were put to the Hearing Examiner and no evidence were given on either side. Furthermore, in imposing the "affirmative of the issue," it is done imposing same "upon the party whose contentions depart further from normal likelihood" (John MacArthur, *Evidence: Common Sense and Common Law,* The Foundation Press, Inc., Mineola, N.Y., 1947, p. 179).

The Hearing Examiner has listened to the tapes made at the Hearing, read the post-Hearing briefs plus all exhibits and cited cases. Based on the above, the Hearing Examiner will develop his rationale for his award.

The first matter that must be addressed is the Appellant's contention that the Written Reprimand was a violation of his First Amendment right to free speech. The contention was made that the contents of the letter in question were relating to a matter of "public concern"; therefore, said statements made in the letter were automatically protected by the First Amendment.

Public employees do not necessarily lose their First Amendment rights to free speech by virtue of their employment as a public employee (police officer). HPOA's position is that even speech that relates to a matter of public concern must be balanced with the ability to provide effective service to the public. *Rankin v. McPherson,* 107 S. Ct. 2891 (1987) and other references not cited. The City, on the other hand, asserts that imposing disciplinary action against the Appellant for the letter he distributed to a small group of HPOA officers on the HPOA Board of Directors does not violate the Appellant's First Amendment right to free speech as the letter in question was not intended to be a serious contribution to

public discussion on a matter of general interest. The basis of the City's position is *Attaway v. City of Mesquite,* 563 S.W. 2d 343 (Tex. App. – Dallas 1978).

The Appellant testified that he did not intend the invitation (letter) to go beyond the HPOA Board of Directors. Even the Appellant's own witness, the 1st V.P. of HPOA, testified that the letter (JE-1, Exh. 3) was "tongue in cheek," "quirky," "satirical," "funny" and had "no social redeeming value." This HPOA officer further testified that he did not believe that the letter was a serious contribution to public discussion. He also testified that the HPOA debates regarding the settlement of the *Edwards* lawsuit were no longer going on at the time the Appellant wrote and distributed JE-1, Exh. 3. The *Edwards* lawsuit had been settled, the consent decree was entered and the benefactors were in the process of being promoted (GE-1 dated May 13, 1993).

In *Connick v. Myers,* 103 S. Ct. 1684 (1983); *Moore v. City of Kilgore, Tex.,* 877 F. 2d 364 (5th Cir. 1989); and *Pickering v. Board of Education,* 88 S. Ct. 1731 (1968) a line of reasoning develops the questions of whether or not an Appellant's letter addresses a matter of public concern by the content, form, and context of a given statement, as revealed by the entire record, and whether or not the Appellant's letter adversely impacted the operation of the HPD.

As previously set forth, the letter was actually intended for the 11 HPOA Board of Directors to which it was distributed, not the entire police force or the general public. In fact, the letter did not directly address the *Edwards* lawsuit. Only an individual who was familiar

with the consent decree itself (*Edwards* lawsuit settlement) would know precisely the entire meaning of the invitation (JE-1, Exh. 3). And even those consent decree knowledgeable individuals who eventually read JE-1, Exh. 3 did not agree as to the meaning of the JE-1, Exh. 3 wording. This is apparent from the testimony of the many witnesses who testified at the Hearing. Was the issue of the consent decree a matter of great public concern? It was to the police officers of HPD, but nothing was present to indicate that the general public had much concern and particularly when the newspaper articles of JE-1, Exh. 11 pointed out the minimal cost effect of the settlement due to the plaintiffs giving up all claims to back pay, that is, pay from 1993 back to 1982. The only immediate cost to the City was the differential in pay between the old and new ranks for the 106 officers promoted under the consent decree over the five year period.

It is the Hearing Examiner's opinion that JE-1, Exh. 3 was not a great public concern.

What, if any, was the impact of JE-1, Exh. 3 on the operation of HPD? This is a question which is difficult to answer in an absolutely correct manner as the "pot had not stewed long enough" for the results to boil over into the day to day operation of HPD due to the handling of the matter by the Chief of Police. The President of OSSO, is his newsletter article (JE-1, Exh. 10), pointed out rather plainly the possible impact that certain terms used in JE-1, Exh. 3 by a new supervisor (the Appellant) might have on the Appellant's future relationship with the minority officers working under the Appellant. Even though there had not been any problems as of the date of the Hearing, at least none that anyone knew about, there

very well could have been or would have been in the future. However, it was pointed out at the Hearing that the area the Appellant was assigned after promotion was the jail. Due to the lawsuit settlement, there was testimony that the jail assignments were not being made to the minority personnel. Since the assignment of personnel to the jail was not fully explored at the Hearing, other than what is stated above, there is the possibility that there were few officers assigned to the jail that might have taken offense at JE-1, Exh. 3, hence the jail would suffer a minimum possible disruption due to the language of JE-1, Exh. 3.

The Hearing Examiner can only say that JE-1, Exh. 3 had the potential of disrupting the operation of the HPD. Hopefully, the action taken by the Chief has short circuited the possible disruptive propensity of JE-1, Exh. 3.

In summary, this Hearing Examiner cannot say that the Appellant's First Amendment rights were violated by the action taken by the Chief of Police (JE-1, Exh. 1).

The remainder of this case deals with the "just cause" portion for the disciplinary action, that is, the three questions set forth in the first portion of this section of the Award.

1. Are the charges made by the Chief true as made?

2. Are those charges legally sufficient?

3. Is the punishment appropriate for the offense?

The Appellant was charged with the violation of three HPD Rules:

Section 2.3 – Conduct and Behavior.

3.1 – Respect for Fellow Officers.

4.21 – Use of Racial Jokes and Slurs.

The appellant admitted he wrote the invitation letter in question (JE-1, Exh. 3) and how he distributed it to only the other HPOA Board of Directors. As previously stated and admitted by the Appellant, the JE-1, Exh. 3 was his reaction to the *Edwards* consent decree. This decree was handed down by a Federal Judge and, regardless of the appellant's feelings, any fault in the decree lies with the court system and not fellow employees of HPD. The decree is now the law for 10 years unless Judge Hughes' decision is reversed by a higher Federal Court. The Appellant even testified that his objection to the terms of the consent decree was that he had spent many weeks studying for the sergeant's examination and he did not feel it was fair or right for someone to be promoted who did not have to study as hard as he did. Nothing was presented at the Hearing to give the Hearing Examiner any idea or feel for the amount of study time needed by other officers to make a sufficiently high score in order to be selected for promotion. Nor was any evidence presented as to the amount of study time that any other officer spent prior to taking the sergeant's examination. Nor was anything presented about previous rankings or scores (other than the 1993 promotion list). Of the 96 officers promoted by the consent decree to the rank of Sergeant, all 96 of them had passed the examination with the required 70% or better. Again, no one knows how hard these 96 officers studied before taking the examination, but whatever the amount, it was sufficient to score above 70%. Furthermore, the consent decree was based

on adverse impact of the test questions for Sergeant and Lieutenant as well as the questions not necessarily being job-related or consistent with business necessity (CE-1). The Hearing Examiner can only say that if the few questions that were in the documents furnished him at the Hearing were examples of the test questions, the examinations must have contained an unknown amount of non job-related and non business necessity questions. All the Hearing Examiner can say is that from 1965-1993 he gave objective tests in labor relation courses but was never able to eliminate all of the non subject matter, ambiguous or nit-picking questions from the tests. In the consent decree itself (CE-1), the adverse impact was shown using statistics. One of the court's remedies was that a log linear analysis be made of the test questions so that the questions that were bad, in the eyes of the court, could be thrown out. Thus spoke the Judge. The Hearing Examiner has taught graduate statistics and took about 36 hours of statistics in his academic work.

The above is again to point out that it was the Judge, not the Appellant's fellow officers, who made the rules and dictated the promotions of the 106 protected officers.

Race was specifically a part of Judge Hughes' consent decree, so the word "race" by itself in JE-1, Exh. 3 was already being used by Judge Hughes. Also HPD indicated and H or B on its promotion list (GE-1) for the May 1993 consent decree promotees. So just the word "race" in the invitation, by itself, should not be any more offensive than the other sources cited above.

The remainder of the invitation will now be discussed.

* * *

> . . . You are cordially invited to attend and give proper and justice (sic) respects to those who deserve it. . . .

The words " . . . to those who deserve it . . . " are certainly putting down someone and, in effect, are defying Judge Hughes' consent decree. Since it is known that the invitation was directed at the officers being promoted by the consent decree, this sentence therefore is violating Sections 2.3 and 3.1.

The last sentence of the invitation says:

* * *

> . . . There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

There is nothing defamatory about "remedial," but when it is used in the context of " . . . 'remedial' promotions from the welfare list . . . " the word takes on a different meaning. The Appellant is now calling the consent decree a welfare list. This statement is a violation of Sections 2.3, 3.1 and 4.21.

The last clause in the invitation says:

> . . . but they should stand out should you decide to congratulate only those who deserve it.

Since the consent decree promotions were all African-American or Hispanic-American officers and GE-1 so designated them, this would allow these officers to be recognized by individuals at the promotion ceremony as being promoted from the consent decree. The Appellant

in this last clause is holding the consent decree promotion officers up for ridicule and again thumbing his nose at Judge Hughes. This portion of the invitation is also a violation of Sections 2.3, 3.1 and 4.21.

In summary, the decision of the Hearing Examiner is that the charges made by the Chief are true as made.

The next question is, "Are those charges legally sufficient?" The answer is a simply "yes." However, there are some other items that need to be brought forward. HPOA has accused HPD of meddling in the internal affairs of its Board of Directors. To a certain extent this is true, but the real guilty parties are the Appellant and a Board of Directors member. The Appellant wrote the invitation on official HPOA stationery. This made the statement a semiofficial HPOA position until it was properly denied. According to the testimony by the President of HPOA, the only action taken against the Appellant was to tell him not to do it again. No evidence was presented to indicate that the HPOA President presented the situation to the Board of Directors to obtain the Board's input as to what action should be taken against the Appellant for misusing HPOA stationery and thus putting HPOA "on the spot." The other guilty party in this matter is the Board of Directors member who did not present the invitation to the Board of Directors for their consideration of what should be done about the situation. Instead, this individual went outside of the HPOA Board to the President of OSSO. Had this action taken place in the private sector, there is a good possibility the guilty Board member would have been possibly fined and/or kicked out of the Union. But the instant matter is in the public sector and it is unknown what is in the HPOA constitution.

The City has set forth its position that the Appellant's invitation could very well be considered defamatory and actionable in a court of law by a class of identifiable individuals. This matter was not specifically addressed in the Chief's Written Reprimand so it is a moot issue as far as this Hearing Examiner is concerned.

The answer to this question is still "yes."

The last question is, "Is the punishment appropriate for the offense?"

The recommendation that came forward to the Chief was Divisional Counseling (JE-1, Exh. 4). According to supervisory testimony, the Chief would not accept anything less than a Written Reprimand, so the recommendation eventually got back to the Chief for a Written Reprimand.

Can a Hearing Examiner mitigate the discipline of the Chief? The answer is "yes." TLGC §143.118 provides that the Civil Service Commission can reduce or reverse disciplinary suspensions imposed by a department head (Chief of Police). TLGC §143.129(d) and 143.057(f) vest the Hearing Examiner with " . . . the same duties and power as the commission . . . . "

This entire case, its background and its future application are full of time limits. As an example, the basic remedial time period was for 1982 to 1991. The lifetime of the eligibility lists for promotions was changed from one to two years, the promotion of the 106 individuals was to take place over five years, the Court retained jurisdiction for 10 years, a yearly report was due the Court by HPD on promotions. Lastly, HPD supervision testified that the

Chief, in running HPD, always looked back three years in an officer's personnel file for any disciplinary matters. In the instant case, the only indefinite action is the Written Reprimand given the Appellant. This disciplinary action will follow the Appellant for the rest of his life and, in effect, brand him as a racist. In spite of being guilty as charged, the Appellant wrote the invitation after many weeks of emotional discussion in the Board meetings about the forthcoming consent decree. The Board members present even voted 100% to oppose the consent decree. The Appellant merely got carried away with the subject matter of the times and should not be made to suffer for the rest of his life for having written the invitation. So what would be a reasonable period for the Written Reprimand to be effective? The answer is sitting right in front of us, namely, three years since that is the time frame the Chief uses to look back at disciplinary records. Furthermore, the Appellant has a "clean record" except for the instant matter.

In summary, the Chief of Police did not violate any law, rule or regulation when he issued a letter of Written Reprimand to the Appellant.

AWARD

The letter of Written Reprimand is upheld for three years from its date of issue. If at the end of those three years the Appellant has not received any more disciplinary actions, the Written Reprimand is to be removed from his file and/or record, per those instructions in TLGC §143.

Since the possible modification of the Written Reprimand is an uncertainty for two more years, the Award is not a split decision and therefore HPOA must pay the hearing Examiner's charges.

/s/ Milden J. Fox, Jr.
Milden J. Fox, Jr., P.E., Ph.D.
29 September 1994

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OSSO NEWS
"THE BEAR NEWS"
June 1993 Newsletter

PRESIDENT'S LETTER

by Ignacio Aranda

There is an attitude that prevails among some officers, that the Hispanic-American and African-American officers promoted as a result of the promotional lawsuit are less deserving than those officers promoted from the existing eligibility list.

Such an attitude was expressed on "OFFICIAL" HPOA stationary by HPOA Board of Director #12, Johnie Vollert. In the letter, Director Vollert issued an invitation to attend his promotion on May 24, 1993 at the High School of Law Enforcement. Director Vollert writes that he is "getting promoted (despite my race)" and that those invited to attend should give proper and just respect to those who deserve it. Director Vollert also writes that "There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it."

Director Vollert's letter is RACIALLY BIASED and DEMEANING to all promotees, some of whom are members of the HPOA. What is more disturbing than his letter is that Director Vollert is a police officer who has been

promoted to the rank of Sergeant, a supervisory position, and without a doubt will be supervising minority members of this department. How can we expect a supervisor with this attitude to be fair and impartial when he deals with minority subordinates. This is one example that the promotional test alone does not produce the best person for promotion.

As OSSO President, I find that this letter written by a Board of Director of Texas' Oldest and Largest Police Association is in poor taste and offensive not only to OSSO but to all minorities of the Houston Police Department.

I wrote a letter to HPOA President, Doug Elder, voicing my concern and utmost contempt at the irresponsible remarks made by one of his Board of Directors. I requested that he as HPOA President immediately demand that Director Vollert resign his board position. President, Elder as the leader of Houston's largest police employee group should hold his directors accountable for such remarks, especially when the remarks are offensive to a segment of their own membership. If in fact the HPOA does try to provide fair and equal representation to all of their members, as they claim this would be an opportunity for them to demonstrate that.

I received a response from HPOA President, Doug elder, in which he stated that he had "contacted Sgt. Vollert and discussed the issuance of an unauthorized letter on HPOA stationary", and that the "contents of the letter were the words of the author, not the policy or position of the HPOA." President Elder further states that the HPOA values its members and does not support or promote

racial or sexual bias of any kind. If these are the true feelings of the HPOA, then why do they still have a Board of Director who promotes racial bias.

We should not remain silent and allow this type of attitude to prevail. We must speak out as an organization, individual members of the HPOA and as fair minded people. This type of attitude and racial bias will not end by remaining silent, it will only get worse. SPEAK UP AND BE HEARD!